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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

MICHAEL M. BUSIC, PETITIONER

v.

UNITED STATES OF AMERICA

ANTHONY LaROCCA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-6020

MICHAEL M. BUSIC, PETITIONER

v.

UNITED STATES OF AMERICA

No. 78-6029

ANTHONY LaROCCA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE
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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinions of the court of appeals (Pet. App. 1B-18B, 1C-4C) are reported at 587 F.2d 577. The opinion of the district court (Pet. App. 1A-15A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1978; thereafter, the government's petition for rehearing was granted, and the judgment on rehearing was entered on December 12, 1978. The petition for a writ of certiorari in

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No. 78-6020 was filed on January 10, 1979, and the petition for a writ of certiorari in No. 78-6029 was filed on January 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a charge under 18 U.S.C. 924(c) may be sustained if the statute creating the predicate felony permits an enhanced sentence when a dangerous weapon is used, but the enhancement provision is not invoked and thus the defendant's sentence is not doubly enhanced because of his use of a firearm (Pet. No. 78-6029).

2. Whether consecutive sentences may be imposed for assaulting a federal officer with a dangerous weapon, in violation of 18 U.S.C. 111, and for carrying a firearm during the commission of that assault, in violation of 18 U.S.C. 924(c)(2) (Pet. No. 78-6020).

STATUTES INVOLVED

18 U.S.C. 924(c) states:

(c) Whoever--

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

18 U.S.C. 111 states:

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

Whoever, in the commission of any such acts uses a deadly or dangerous weapon, shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioners were convicted on five counts of narcotics offenses, in violation of 21 U.S.C. 841(a)(1), 843(b), and 846 (Counts 1-5), and on six counts of unlawful possession of firearms, in violation of 26 U.S.C. 5861(c) and (d), 5871, 18 U.S.C. 922(h), and 924(a) (Counts 8-13).^{1/} Petitioners were also convicted of two counts of armed assault on federal officers, in violation of 18 U.S.C. 2 and 111 (Counts 6 and 7). Petitioner Busic was convicted of unlawfully carrying a firearm in the commission of federal felonies, in violation of 18 U.S.C. 924(c)(2) (Count 18). Petitioner LaRocca was convicted of using a firearm in the commission of a federal felony, in violation of 18 U.S.C. 924(c)(1) (Count 19).

Petitioners were each sentenced to a total of 30 years' imprisonment, apportioned as follows: concurrent terms of five years' imprisonment on Counts 1 through 4, with special parole terms on each count ranging from two to three years, and four years' imprisonment on Count 5; five years' imprisonment on Counts 6 through 13 to be served concurrently with

^{1/} Petitioner Busic was not convicted on Count 12. Busic was convicted on three additional counts of unlawful possession of firearms, in violation of 18 U.S.C. 1202(a)(1) (Counts 14-16).

each other, but consecutively to the sentences on Counts 1 through 5; petitioner Busic was also sentenced to terms of two years' imprisonment on Counts 14 through 16, to be served concurrently with each other and with the sentences imposed on Counts 6 through 13, and to 20 years' imprisonment on Count 18 to be served consecutively to all other terms; petitioner LaRocca was sentenced to 20 years' imprisonment on Count 19 to be served consecutively to all other terms.

1. The evidence at trial showed that Charles D. Harvey, an agent of the Drug Enforcement Administration, first met petitioners on May 7, 1976, at the home of Richard Hervaux, a government informant. At that time petitioners agreed that Harvey would go with them to Florida to purchase drugs from one of the petitioners' suppliers for re-distribution in the Pittsburgh area (Tr. 21-22). Several days later, Harvey again met with petitioners and received samples of the marijuana and cocaine that he was to purchase from their Florida source (Tr. 29-30). The next day, after Harvey had arranged for his trip to Florida, LaRocca called him and insisted on seeing some "front money." A meeting was arranged for the following day in the parking lot of a shopping center in Monroeville, Pennsylvania (Tr. 32-33).

After he arranged for surveillance, Harvey went to the shopping center with \$30,000 in cash, as agreed (Tr. 34-35). Petitioners were already there in LaRocca's car (Tr. 36). LaRocca entered Harvey's car, and the two drove to the other side of the parking lot (Tr. 39). As Harvey withdrew the money from the trunk, LaRocca reached for his gun. Harvey ran, but LaRocca caught him and pointed his gun at Harvey's chest. Harvey gave a pre-arranged signal to the surveillance agents. As the agents began to converge on the scene, LaRocca fired at Harvey and missed. LaRocca then fired two shots at

the vehicle containing agents Alfree and Petraitis and two shots at the vehicle containing agent Macready (Tr. 40). He was then arrested and disarmed.

The officers also arrested Basic, who had been leaning on a nearby car during the shootout, and who exclaimed, "remember that I didn't shoot at anybody and I didn't draw my gun" (Tr. 40-41). Basic was searched, and a pistol was found in his belt. A search of LaRocca's car uncovered an attache case containing another pistol and a plastic box containing ammunition (Tr. 41). When the car was further searched the following day, government agents found yet another pistol under the driver's seat and another box of ammunition in the glove compartment (Tr. 44).

2. a. In a decision announced prior to the decision of this Court in Simpson v. United States, 435 U.S. 6 (1978), the court of appeals held that 18 U.S.C. 924(c) is applicable to a defendant who is also charged with aggravated assault of a federal officer under 18 U.S.C. 111 (Pet. App. 6B).^{2/} It also held that when the deadly weapon used in the Section 111 assault is a firearm, and the felony charged under Section 924(c)(1) is the assault that forms the basis of the charge under Section 111, sentencing the defendant on both counts would violate the Double Jeopardy Clause (Pet. App. 9B). Accordingly, the court of appeals held that LaRocca's case must be remanded to the district court for resentencing under either Section 111 or Section 924(c)(1), but not both (Pet. App. 10B). In contrast, the court affirmed petitioner Basic's conviction on both counts, because it concluded that a prosecution for carrying a weapon during the commission of a felony under 18 U.S.C. 924(c)(2) requires proof of an element--the unlawful

2/ "Pet. App." refers to the appendix filed in No. 78-6020.

possession of a firearm--that is not an element of the offense under Section 111 (Pet. App. 10B-11B).

b. Following this Court's decision in Simpson, the court of appeals granted rehearing, vacated the portion of its first opinion dealing with the Double Jeopardy Clause, and reached the same disposition of the case by applying the rationale of this Court's opinion in Simpson (Pet. App. C1-C3). The court of appeals concluded (Pet. App. C2) that Simpson prohibits sentencing a defendant both under the enhancement provision of Section 111 and under Section 924(c)(1), but that the government has the option of proceeding under either section; accordingly, it was proper to remand LaRocca's case for resentencing under either Section 111 or Section 924(c)(1) at the government's option.^{3/} The court found the rationale of Simpson inapplicable to Basic's conviction under Section 924(c)(2) for "unlawfully" carrying a weapon during the commission of a felony, and it affirmed that conviction (Pet. App. C3).

DISCUSSION

1. Petitioner LaRocca received a five-year sentence under the enhancement portion of 18 U.S.C. 111^{4/} and a consecutive sentence of 20 years' imprisonment for using a firearm during the commission of the Section 111 felony. He argues that Simpson holds that Section 924(c) is wholly inapplicable in any case where Congress has expressly provided for an enhanced sentence if a firearm is used in the commission of a given

^{3/} The court rejected (Pet. App. 10B) the government's alternative argument that LaRocca's Section 924(c) conviction could be upheld on the ground that the petitioners' firearms were carried and used not only in the commission of the assault offense, but also in the commission of acts forming part of the narcotics conspiracy of which the jury convicted them.

^{4/} Under Section 111, unarmed assaults are punishable by up to three years' imprisonment; assaults accomplished with a dangerous weapon are punishable by up to 10 years. Accordingly, two years of LaRocca's five-year sentence constitute an enhancement penalty under Section 111.

offense. Therefore, he contends, the court of appeals erred in interpreting Simpson to permit a defendant who used a firearm in the commission of a Section 111 felony to be sentenced under Section 924(c) in lieu of sentencing under the more lenient enhancement provision of Section 111.

We acknowledge that there is language in the Court's opinion in Simpson that lends considerable credence to petitioners' contention that Section 111 violations can never supply the predicate for a conviction under Section 924(c)(1), especially the Court's reliance upon the statement of Congressman Poff (see 435 U.S. at 13; but see p. 10 n.8, *infra*). But the holding of Simpson was a narrow one that refused "to allow the additional sentence authorized by §924(c) to be pyramided upon a sentence already enhanced under §2113(d) * * *" (435 U.S. at 14). Thus, while the holding of Simpson unquestionably would bar the enhancement of the sentence imposed under Section 111 for use of a dangerous weapon and the imposition of an additional, consecutive sentence under Section 924(c)(1) for the same firearm use, it does not dispose of the question --which we submit is materially different--of the propriety of imposing a sentence under Section 924(c)(1) in lieu of using the enhanced penalty provision of the underlying felony statute.

Since the Court in Simpson had before it only a case where the defendant's sentence was doubly enhanced because of the use of a firearm in the commission of a bank robbery, it had no occasion to pass upon the question whether Congress--even though it did not intend to permit the double enhancement of sentences that occurred in Simpson--may nevertheless have intended to allow the prosecutor the discretion to charge and the court to sentence under either the enhancement provisions included in Sections 2113 and 111, or the enhancement provision in Section 924(c). Because Section 924(c) creates

penalties that are both qualitatively and quantitatively different from the penalties incorporated in the aggravated assault statute and other similar laws dealing with "dangerous weapons," we believe the question whether Section 924(c) may be invoked as an alternative to the enhancement provisions in such statutes is an important one that merits independent consideration. Moreover, we note that the only two courts of appeals to pass on this question since Simpson, the Third Circuit in the instant case and the Fifth Circuit in United States v. Shillingford, 586 F.2d 372, 376 & n.7 (1978), have concluded, as we urge here, that the penalty provisions of Section 924(c) may be invoked in lieu of specific enhancement provisions in Sections 111 and 2113(d).

Instead of merely providing for longer terms of incarceration, Section 924(c) establishes mandatory minimum sentences, imposes increasingly severe sentences on recidivists (without possibility of suspension or probation), and prohibits concurrent sentencing. Thus, a first offender under Section 924(c) must receive at least a one-year consecutive sentence, while a second-time offender must serve (without suspension or probation) a minimum two-year consecutive sentence and may receive (without suspension or probation) a consecutive 25-year sentence. These comprehensive penalties reflect Congress' determination to curb the particularly lethal risks created by the use of a firearm in the commission of a felony^{5/}--risks that Congress could legitimately have concluded are more serious than the risks attending the use of any other dangerous weapon, which are sufficient to trigger

^{5/} The Gun Control Act of 1968 (Pub. L. No. 90-618, 82 Stat. 1213), of which Section 924(c) became a part, was enacted largely in response to a single concern: the "increasing rate of crime and lawlessness and the growing use of firearms in violent crime." H.R. Rep. No. 1577, 90th Cong., 2d Sess. 7 (1968).

the enhancement provision of Section 111.^{6/}

By contrast, neither Sections 111 nor 2113(d) prescribes mandatory minimum sentences, nor do they prohibit concurrent sentences or probation. Moreover, the maximum sentence of 10 years' imprisonment under the enhancement provision of Section 111 is only seven years greater than the maximum sentence under Section 111 for simple assault. If petitioners are correct, a person who, armed with a gun, assaults a federal officer would be subject to no more than an additional seven years' imprisonment for his first offense (with no mandatory minimum sentence), whereas persons committing any other federal felony while so armed would be exposed to an additional sentence of at least one, and possibly 10 years. If the person committing an assault armed with a gun were a recidivist, he would remain exposed to only seven additional years of imprisonment (with no mandatory minimum) under Section 111, with the possibility of probation or a concurrent sentence, whereas all other persons twice convicted of using a firearm to commit any other felony would face an additional consecutive sentence of at least two and possibly 25 years' imprisonment without suspension or probation under Section 924(c).^{7/}

^{6/} Indeed, the principle of giving "precedence to the terms of the more specific statute where a general statute and a specific statute speak to the same concern"--on which the Court relied in Simpson, 435 U.S. at 15--arguably suggests that in a case where a firearm is employed in the commission of an assault in violation of Section 111 or a bank robbery, the more specific firearm enhancement provision in Section 924(c) should be given precedence over a more general dangerous weapon enhancement provision. Moreover, the firearm provision, enacted in 1968, long after the enhancement provisions of Section 111 or 2113, more fairly reflects the contemporary congressional view of the gravity of the use of firearms in the commission of federal felonies.

^{7/} Similarly, the maximum sentence for aggravated bank robbery under Section 2113(d) is only five years greater than the maximum for simple bank robbery, whether or not the robber is a recidivist. In contrast, under Section 924(c), the

[Continued]

In our view, it is most unlikely that Congress intended to subject persons who commit aggravated assaults on federal officers to lower penalties than other gun-wielding felons. The Court concluded in Simpson that in the absence of a clear statement of congressional intent, the rule of lenity counsels an interpretation of Section 924(c) that precludes the double enhancement of a defendant's sentence for the use of a firearm in the commission of a felony.^{8/} But the principle of lenity does not lead to the result--which we believe Congress surely did not intend--that persons who commit aggravated assaults on federal officers should be subject to lesser penalties, and thus to a lesser deterrent, than all other gun-wielding felons. Petitioners' construction of Section 924(c) has the perverse consequence of rendering the stiff penalty provisions that Congress enacted to deter the increasing use of firearms inapplicable to the very class of offenses--including bank robbery and assault on a federal officer--where Congress had already found that enhanced penalties were needed to deter and punish those who used dangerous weapons.

use of a gun in the commission of the robbery would subject the defendant to an additional sentence of up to 10 years for a first offense and up to 25 years for a second offense.

^{8/} Congressman Poff stated (114 Cong. Rec. 22231 (1968)) that Section 924(c) "is not intended to apply to title 18, sections 111, 112, or 113, which already define the penalties for the use of a firearm in assaulting officials, [or] with sections 2113 or 2114 concerning armed robberies of the mail or banks * * *." The Court concluded in Simpson (435 U.S. at 15) that the "sparse" legislative history of Section 924(c), especially the Poff statement, "points in the direction of a congressional view that the section was intended to be unavailable in prosecutions for violations of §2113(d)"--the aggravated bank robbery statute. We agree it likewise "points in the direction" of prohibiting the use of both Section 924(c) and the enhancement provision in Section 111. But we do not think Congressman Poff was speaking to the question, which was not raised in the debates, of whether Section 924(c) could be invoked in lieu of the dangerous weapons provisions in an appropriate case.

In our view, Section 924(c) should be interpreted as an alternative to the aggravated assault provision in Section 111 and the other similar laws dealing with the use of "dangerous weapons" in the commission of particular crimes. As we argued at length in our brief in Batchelder v. United States, No. 78-776 (argued April 18, 1979), in the case of such an overlap, where two statutes are applicable to the same criminal conduct, the prosecutor has the discretion to select the proper charge.^{9/} We agree with petitioners that this question should be resolved by this Court in order to clarify the options available to prosecutors and sentencing courts in light of Simpson.^{10/}

2. Petitioner Busic contends (Pet. 5-8) that the court of appeals erred in concluding that the decision in Simpson does not preclude the imposition of an additional penalty under Section 924(c)(2) for unlawfully carrying a weapon during the commission of an assault for which he has received an enhanced sentence under Section 111. If, as we contend, the prosecutor has discretion to charge under either the enhanced sentencing provisions of Section 111 or under Section 924(c), there is no need to consider in this case the question whether--as the court of appeals concluded--a defendant may also be sentenced

^{9/} We are sending petitioners copies of our brief in Batchelder.

^{10/} We note that, had the district court understood the law to be as petitioners contend, it could have imposed sentences cumulating to the same length, without regard to Section 924, by making consecutive some of the sentences that were imposed concurrently. Indeed, it seems likely that the court would have done so, since the legal issue raised by petitioners is wholly unrelated to the severity of the offenses they committed. Accordingly, petitioners could receive a substantial and undeserved windfall if they prevail on their contentions. If the Court does grant review of the case and ultimately sustains petitioners' contention, we believe it would be appropriate to remand to the district court for complete resentencing on all counts (such resentencing not to exceed, of course, the total of 30 years' imprisonment originally imposed).

under both the enhanced sentencing provision of Section 111 and under Section 924(c)(2). Since Busic's five-year sentence under Section 111 was concurrent with the seven other five-year terms of imprisonment, only his sentence under Section 924(c)(2) will actually affect the term of his incarceration.

Moreover, whatever the merits of the court of appeals' conclusion that the Simpson rationale is inapplicable as a general matter to a charge under Section 924(c)(2), the Court need not reach that question in the instant case. There is ample reason to permit Busic's sentencing under both the enhancement provision and under Section 924(c)(2). Whereas this Court noted in Simpson that the government was relying on "the same proofs to support the convictions under both statutes" (435 U.S. at 12), Busic's conviction under Section 111--and its enhanced sentencing provision--was imposed because he aided and abetted LaRocca's armed assault on agent Harvey. Whereas the charge under Section 111 was aggravated assault because LaRocca was armed with a gun, Busic's sentence under Section 924(c)(2) was imposed because Busic himself was carrying a second gun. Busic violated Section 924(c)(2) because his possession of this second weapon was unlawful in view of his prior felony conviction. In this situation, the rationale of Simpson is, as the court of appeals correctly concluded, simply inapplicable.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

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